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RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA S.J.

DENNIS M. BROWN, Bar No. 126575
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Attorneys for Defendants
SEARS, ROEBUCK AND CO.

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOU ANN LOWENSTEIN,

Plaintiff,

v.

SEARS, ROEBUCK AND CO., a
corporation; and DOES 1 through 20,
inclusive,

Defendants.

C08 03237

PJH

NOTICE TO FEDERAL COURT OF
REMOVAL OF CIVIL ACTION FROM
STATE COURT

28 U.S.C. § 1441(B) DIVERSITY

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE that Defendant Sears, Roebuck and Co. ("Defendant") hereby removes the above-entitled action, Case No. CIV-473392, from the Superior Court of the State of California, County of San Mateo, to the United States District Court for the Northern District of California, pursuant to 28 U.S.C. §§1332(a)(1), 1441, and 1446.

I. JURISDICTION

1. The U.S. District Court has original jurisdiction over this matter pursuant to 28 U.S.C. 1332(a)(1). This case may be removed pursuant to 28 U.S.C. §§1441(b) and 1446 because it is a civil action in which the amount in controversy exceeds \$75,000, exclusive of interest and costs, it is between citizens of different states, and no defendant is a citizen of the State of California.

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NOTICE TO FED CT OF REMOVAL OF CIVIL ACTION FROM STATE COURT - DIVERSITY

II. INTRADISTRICT ASSIGNMENT

2. Venue in the San Francisco Division is proper because the events giving rise to Plaintiff's claim occurred in San Mateo County, California. N.D. Cal. R. 3-2(c).

III. GENERAL INFORMATION

3. On June 4, 2008, Plaintiff filed a Complaint in the Superior Court of the State of California, County of San Mateo, entitled, LOU ANN LOWENSTEIN v. SEARS, ROEBUCK & COMPANY, a corporation and DOES I-XX, designated as Case No. CIV-473392.

4. In the Complaint, Plaintiff alleges that she was discriminated against in her employment with Defendant on the basis of her disability. A true and correct copy of the Summons and Complaint from the San Mateo County Superior Court is attached hereto as **Exhibit "A."**

5. On June 5, 2008, Defendant was served with the Summons and Complaint, via process server on Defendant's registered agent for service. A true and correct copy of the Service of Process is attached hereto as **Exhibit "B."**

6. On July 3, 2008, Defendant filed a General Denial and Affirmative Defenses pursuant to Cal. Code of Civ. Proc. § 431.30 in the San Mateo County Superior Court. A true and correct copy of Defendant's General Denial and Affirmative Defenses is attached hereto as **Exhibit "C."**

7. There is no other defendant, other than Sears, Roebuck and Co., named in the Complaint.

8. This Notice to Federal Court of Removal of Civil Action is timely in that it is filed within thirty days of June 5, 2008, the date Plaintiff's complaint was served on Defendant. Cal. Code of Civ. Proc. §415.30(c); Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999); Brown v. Demco, Inc., 792 F.2d 478 (5th Cir. 1986) (thirty day removal period runs for all defendants from the date served with the original complaint); McAnally Enterprises, Inc. v. McAnally, 107 F. Supp. 2d 1223, 1229 (C.D. Cal. 2000) (same).

9. The aforementioned action is a civil action in which this Court has original jurisdiction under provision of Title 28, § 1332(a) of the United States Code and is one that may be removed to this court by Defendant, pursuant to Title 28, Section 1441(b) of the United States Code. This case is a civil action between citizens of different states and it is obvious from the face of the

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1 Complaint that Plaintiff seeks more than \$75,000 in damages, exclusive of interest and costs.

2 **IV. DIVERSITY**

3 10. Diversity grounds for removal exist based upon the following:

4 a. Defendant is informed and believes that Plaintiff was, at the time of
5 commencing this action, and still is, a citizen and resident of San Mateo County, California.
6 (Complaint ¶2.)

7 b. At the time this action was commenced in state court, Defendant was,
8 and still is, a corporation incorporated under the laws of the State of New York with its principal
9 place of business in the State of Illinois. Thus, Defendant is not a citizen of the State of California
10 where this action was brought. 28 U.S.C. §§1332 (c)(1).

11 c. Defendants designated as DOES I to XX are fictitious defendants, are
12 not parties to this action, have not been named or served, and are to be disregarded for the purpose of
13 this removal. 28 U.S.C. § 1441(a). McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir.
14 1987). The Doe defendants, therefore, need not consent to this removal.

15 11. No other party has been named or has been served as of the date of this removal.

16 **V. AMOUNT IN CONTROVERSY**

17 12. In order to satisfy the \$75,000 amount in controversy requirement, the removing party
18 must demonstrate that the amount in controversy "more likely than not" exceeds \$75,000. Sanchez
19 v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).

20 13. The District Court may consider whether it is facially apparent from the complaint
21 that the jurisdictional amount is met. Singer v. State Farm Mutual Auto Ins. Co., 116 F.3d 373, 377
22 (9th Cir. 1997); Conrad Assoc. v. Hartford Accident & Indemnity Co., 994 F. Supp. 1196, 1198
23 (N.D. Cal. 1998).

24 14. In the present case, Plaintiff's Complaint seeks monetary damages, lost wage
25 earnings, retirement benefits and other employee benefits, emotional distress damages, attorney's
26 fees, which, on the face of the complaint, seek an aggregate amount in excess of \$75,000. The
27 aggregation of Plaintiff's claims is sufficient to meet the \$75,000 amount in controversy
28 requirement. Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d

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3.

NOTICE TO FED CT OF REMOVAL OF CIVIL ACTION FROM STATE COURT - DIVERSITY

59, 62 (2d Cir. 1999); White v. FCI USA, Inc. (5th Cir. 2003) 319 F.3d 672, 674. See Bank of California v. Twin Harbors Lumber Co., 465 F.2d 489, 491 (9th Cir. 1972).

15. In addition to compensatory damages, punitive damages are also properly included in computing the jurisdictional amount. Gibson v. Chrysler Corp., 261 F.3d 927, 945 (9th Cir. 2001). In this matter, Plaintiff has pleaded claims for punitive damages in paragraph 32. A removing defendant may demonstrate that it is "facially apparent" from the complaint that the claims likely exceed \$75,000, by showing that punitive damages have been pleaded. In White v. FCI USA, Inc., 319 F.3d 675-676, the Court held that it was facially apparent that plaintiff's wrongful termination claim exceeded the \$75,000 amount in controversy jurisdictional requirement based on her "lengthy list of compensatory and punitive damages" which included a claim for loss of pay, benefits, impaired future earning capacity, harm to credit and emotional distress.

16. Plaintiff has also pleaded a claim for emotional distress damages and attorney's fees. Attorney's fees recoverable by statute or contract are also properly included in the amount in controversy. See Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1156 (9th Cir. 1998). Prevailing plaintiffs asserting claims for discrimination under the Fair Employment and Housing Act "FEHA" may recover attorney fees. See Cal. Govt. Code § 12965(b); Cal. Code of Civ. Proc. §§ 1032, 1033.5(a)(10).

17. Accordingly, it is apparent from the face of the Complaint that the \$75,000 amount in controversy requirement is met. See Bosinger v. Phillips Plastics Corp., 57 F. Supp.2d 986, 989 (S.D. Cal. 1999) (finding federal jurisdiction over matter, noting that since plaintiff had pleaded contract and tort damages, along with punitive damages, the complaint exceeded the \$75,000 amount in controversy requirement).

18. Therefore, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

19. Defendant Sears, Roebuck and Co., and its attorneys, join and consent to the removal of this cause to the United States District Court for the Northern District of California, San Francisco Division.

20. All pleadings, process or orders received by Defendant in the case are attached hereto. Defendant has received no other process pleadings or orders.

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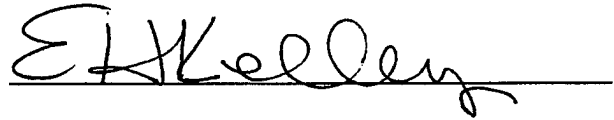
4.

NOTICE TO FED CT OF REMOVAL OF CIVIL ACTION FROM STATE COURT - DIVERSITY

1 **VI. NOTICE TO COURT AND ADVERSE PARTIES**

2 21. Contemporaneously with the filing of this Notice of Removal in the United States
3 District Court for the Northern District of California, written notice of the removal will be given by
4 the undersigned to Plaintiff's counsel and a copy of this Notice of Removal will be filed with the
5 Clerk of the Superior Court for the State of California, County of San Mateo.

6 Dated: July 3, 2008

7 
8

9 DENNIS M. BROWN
10 LITTLER MENDELSON
11 A Professional Corporation
12 Attorneys for Defendants
13 SEARS, ROEBUCK AND CO.
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EXHIBIT A

SUM-100

**SUMMONS
(CITACION JUDICIAL)**

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
SEARS; ROEBUCK AND CO., a corporation; and
DOES 1 through 20, inclusive.

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTA DEMANDANDO EL DEMANDANTE):
LOU ANN LOWENSTEIN

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ENDORSED FILED
SAN MATEO COUNTY

JUN 04 2008

Clerk of the Superior Court
By R. Montgomery
DEPUTY CLERK

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DIAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):
San Mateo Superior Court

CASE NUMBER
(Número del caso): 473392

400 County Center

Redwood City, CA 94063

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Neil Gielegem
1875 Century Park East, Suite 700
310 284 3252

Gielegem Law Firm
Los Angeles, CA 90067

DATE: JUN 04 2008
(Fecha)

JOHN C. FITTON

Clerk, by
(Secretario)

R. MONTGOMERY, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[REAL]

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Sears, Roebuck and Co.
under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☒ CCP 416.80 (authorized person)
☐ other (specify):
4. ☒ by personal delivery on (date): Jun 5, 2008 9:57 AM

1 Neil Gieleghem SBN 107389
 Gieleghem Law Office
 2 1875 Century Park East, Suite 700
 Los Angeles, CA 90067
 Telephone: (310) 284-3252
 3 Telecopier: (310) 284-3253
 4 ngieleghem@sbcglobal.net

5 Attorneys for Plaintiff Lou Ann Lowenstein

ENDORSED FILED
SAN MATEO COUNTY

JUN 04 2008

Clerk of the Superior Court
 By K. Montgomery
 DEPUTY CLERK

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 COUNTY OF SAN MATEO

11 LOU ANN LOWENSTEIN,

12 Plaintiff,

13 vs.

14 SEARS, ROEBUCK AND CO., a corporation;
 15 and DOES 1 through 20, inclusive,

16 Defendants.

CASE NO. **CV 473392**

PLAINTIFF'S COMPLAINT FOR:

1. **DISCRIMINATION IN
 VIOLATION OF CALIFORNIA FAIR
 EMPLOYMENT AND HOUSING ACT**

JURY TRIAL DEMANDED

BY FAX

18 Plaintiff LOU ANN LOWENSTEIN (hereinafter "Plaintiff" or "Lowenstein") alleges as
 19 follows, and demands a trial by jury of all issues and for causes of action set forth below:

GENERAL ALLEGATIONS

21 1. This Court is the proper court and this action is properly filed in the County of
 22 San Mateo, State of California because Defendants do business in the County of San Mateo;
 23 because Defendants' obligations and liability arise therein; and because the wrongful acts by
 24 Defendants complained of herein were committed in this County.

25 2. Plaintiff is a female person born on or about February 14, 1961, and at all times
 26 relevant was and is a resident of the County of San Mateo, State of California. Plaintiff was
 27 employed by Defendants from October, 1985 to December 3, 2005, when she was discriminated
 28 against and constructively discharged in violation of California law, as alleged below.

1 3. Plaintiff is informed and believes, and thereon alleges, that Defendant SEARS,
2 ROEBUCK AND CO. (hereinafter "Sears") is a New York corporation doing business in,
3 among other locations, the County of San Mateo at, among other locations, 40 Hillsdale Mall,
4 San Mateo, California.

5 4. The true names and capacities, whether individual, corporate, associate, or
6 otherwise, of DOES 1 through 20 are unknown to Plaintiff at this time, who therefore sues the
7 DOE Defendants by such fictitious names. Plaintiff will amend this Complaint to show the true
8 names and capacities of said DOE Defendants when the same have been ascertained.

9 5. At all relevant times alleged herein Plaintiff was employed by Defendants under
10 an employment agreement that was partly written, partly oral and partly implied.

11 6. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts
12 and omissions alleged herein were performed by, and/or attributable to, all Defendants, each
13 acting as agents and/or employees of each other, and/or acting under the direction and control
14 of each other; and that said acts and failures to act were within the course and scope of said
15 agency, employment and/or direction and control. Plaintiff is informed and believes, and thereon
16 alleges, that at all times material hereto Defendants were and are the agents of each other.

17 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

18 **Plaintiff Suffers From Turner Syndrome**

19 7. Until shortly before she was constructively discharged, Ms. Lowenstein had
20 worked for Sears without incident for about 20 years (from approximately October, 1985 to
21 December, 2005) as a merchandising and customer assistance person, and was earning \$10.95
22 an hour at the time of her termination.

23 8. At the time she was hired, Ms. Lowenstein suffered from (and still suffers from)
24 a well-recognized medical condition known as "Turner Syndrome" ("TS"). Plaintiff is informed
25 and believes, and on that basis alleges, that, broadly stated, TS is a chromosomal condition that
26 describes girls and women with common features that are caused by complete or partial absence
27 of the second sex chromosome. The syndrome is named after Dr. Henry Turner, who was among
28 the first to describe its features in the 1930s.

9. Plaintiff is informed and believes, and thereon alleges, that TS occurs in approximately 1 in 2,000 live female births, and in as many as 10% of all miscarriages. TS has a number of physical characteristics, the most common or obvious of which is shorter stature. The average height of an adult TS woman who has received human growth hormone treatment is 4'8." Consistent with this, Ms. Lowenstein is of very diminutive stature.

10. Plaintiff is informed and believes, and thereon alleges, that TS has other physical characteristics, the presence and/or degree of which vary greatly between individuals. TS individuals are, on average, of normal overall intelligence with the same variance as the general population. Ms. Lowenstein, however, suffers from mental impairment as a result of her condition. Despite this mental impairment, Ms. Lowenstein is a high school graduate, and can communicate and function effectively in the workplace (as evidenced by her long employment with Sears).

11. Plaintiff is informed and believes, and thereon alleges, that TS individuals can be more "retiring," and less confrontational, in high-stress situations. In this regard, Ms. Lowenstein is more sensitive to unwarranted criticism and harassment, and less able to "defend" herself, than a similarly situated non-TS person.

Despite Suffering From Turner Syndrome, Ms. Lowenstein Worked Successfully For
Sears For Almost Two Decades

12. Ms. Lowenstein's TS was not an issue for Sears when she was hired in 1985 to stock merchandise on the sales floor, to return merchandise to the sales floor from the fitting rooms, and to organize merchandise by size on the correct racks. Broadly stated, Ms. Lowenstein held the same position, and did the same core job functions, throughout her tenure at Sears, although she worked at several different Sears stores in the San Francisco Bay Area.

13. There is no evidence that Sears had any issues with Ms. Lowenstein's ability to do her job, or her job performance, for almost 20 years after her hire. To the contrary, Ms. Lowenstein clearly met all of Sears's expectations, as evidenced by her continued employment and the lack of any evidence of unsatisfactory job performance.

14. Ms. Lowenstein enjoyed working for Sears, and enjoyed the sense of

responsibility and freedom she gained by being employed. Ms. Lowenstein also enjoyed interacting with her fellow Sears employees, and with customers. These emotionally affirming aspects of Ms. Lowenstein's employment were particularly important to her. Ms. Lowenstein's condition requires her to live with her elderly parents, and the sense of personal worth and identity, and the interaction with other people, that she got from her job represent a significant aspect of her damages.

The Work Environment Changes When Ms. Lowenstein Is Assigned To A New Supervisor

15. There is no reason to believe that Ms. Lowenstein would not have continued to work for Sears until her retirement at age 65. In approximately April, 2005, however, Ms. Lowenstein was assigned a new immediate supervisor, Jayti Dasgupta. (Plaintiff is informed and believes, and on that basis alleges, that Dasgupta was Plaintiff's "supervisor" in the Sears workplace within the meaning of California's Fair Employment and Housing Act ("FEHA").) From that point on, Ms. Lowenstein's working conditions deteriorated consistently until her constructive discharge in late November/early December, 2005.

16. Dasgupta seemed to take an immediate dislike to Ms. Lowenstein. Dasgupta found fault with virtually everything that Ms. Lowenstein did, even though her work performance remained the same. For example, Dasgupta would repeatedly complain that Ms. Lowenstein "wasn't working fast enough" in re-racking merchandise, and clap her hands at Ms. Lowenstein in a demeaning manner in an effort to make her work faster.

17. Dasgupta also made derogatory comments about Ms. Lowenstein to the latter's fellow employees; yelled at her in front of other employees (and customers); and otherwise went out of her way to make Ms. Lowenstein's working environment as unpleasant as possible. On a number of occasions, Dasgupta's harassment reduced Ms. Lowenstein to tears, which were noticed by other employees and customers.

18. Dasgupta also made a deliberate effort to "rattle" Ms. Lowenstein; to make her nervous; and to force her to quit. Among other things, Dasgupta repeatedly asked Ms. Lowenstein "How did you get a job here?"; claimed that she was the only merchandising

1 associate that ever made any mistakes; and told Ms. Lowenstein that "If you don't shape up in
2 30 days, you're gone."

3 19. Dasgupta's sudden fault-finding campaign against Ms. Lowenstein stands in stark
4 contrast to the latter's prior employment history with Sears. This campaign is patently
5 pretextual. Whatever the improper and illegal motivation for this ill-treatment – e.g., lack of
6 proper management training and supervision; ignorance of the applicable anti-discrimination
7 laws; misplaced concern about Ms. Lowenstein's appearance to customers – Dasgupta clearly
8 decided that Ms. Lowenstein "had to go."

9 20. Other Sears employees noticed the way in which Dasgupta was singling out Ms.
10 Lowenstein, including the store's Human Resources officer, Holly Wolak. Unfortunately, the
11 latter apparently did nothing to address the problem, and Dasgupta's harassment continued.

12 21. Ms. Lowenstein ultimately reached her breaking point. In October 2005, she met
13 with Ms. Dasgupta and the store manager, Valerie Funai. (Plaintiff is informed and believes, and
14 on that basis alleges, that Funai also was Plaintiff's "supervisor" in the Sears workplace within
15 the meaning of the FEHA). Ms. Lowenstein requested to be transferred to another department.
16 This request was refused, and Dasgupta's harassment campaign continued unchecked.

17 22. On or about November 30, 2005, Dasgupta again unfairly harassed Ms.
18 Lowenstein about her job performance, and again reduced her to tears. Ms. Lowenstein became
19 so upset that she did not feel she could remain in the workplace for the three-hour remainder of
20 her shift, and told Dasgupta she was leaving for the day. As she left, Ms. Lowenstein returned
21 to Dasgupta the store mobile telephone that she had been using in connection with her job duties.

22 23. In the process of leaving for the day, Ms. Lowenstein did not say "I quit," or
23 anything else that would have caused a reasonable, unbiased supervisor to conclude that Ms.
24 Lowenstein was suddenly and unceremoniously ending her employment with Sears after almost
25 20 years on the job. Consistent with this, Ms. Lowenstein returned for work on her next
26 scheduled shift day. On arrival, however, Ms. Lowenstein was told that she had "abandoned"
27 her job by leaving early on November 30, 2005.

28 24. Significantly, Sears's internal documentation is inconsistent with the company's

1 current claim that Ms. Lowenstein "quit" or "abandoned her job" on November 30, 2005.
 2 Specifically, the "Associate Separation Form" prepared by the store's Human Resource officer,
 3 Ms. Wolak, states that Ms. Lowenstein "voluntarily terminated" her employment effective
 4 December 3, 2005.

5 **Sears's Failure To Conduct An Impartial Investigation Of Ms. Lowenstein's Claims of**
 6 **Harassment And Discrimination**

7 25. After her constructive discharge, Ms. Lowenstein complained in writing to Sears
 8 about her mistreatment. As far as Ms. Lowenstein is aware, Sears failed to conduct any impartial
 9 investigation into her claims as required by California law. For example, Sears has never
 10 requested to interview Ms. Lowenstein, and Ms. Lowenstein has no information that the
 11 company interviewed any of the potential employee and customer witnesses to her mistreatment.
 12 Further, Ms. Lowenstein is unaware that Sears ever took any disciplinary action against
 13 Dasgupta, or the other supervisory personnel involved.

14 **Exhaustion of Administrative Remedies**

15 26. On or about June 14, 2006, Ms. Lowenstein filed an administrative complaint
 16 with the California Department of Fair Employment and Housing ("DFEH") against Sears, which
 17 complaint also named Ms. Dasgupta. A true and correct copy of this DLSE complaint is attached
 18 hereto as Exhibit A. On or about June 8, 2007, the DFEH issued Plaintiff "right-to-sue" letters
 19 as to Sears and as to Ms. Jayti. True and correct copies of these right-to-sue letters are Exhibit
 20 B and made part hereof. Therefore, all conditions precedent to the institution of this lawsuit have
 21 been fulfilled.

22 **FIRST CAUSE OF ACTION**

23 (Discrimination in Employment In Violation of the FEHA,

24 Against All Defendants, Cal. Gov. Code § 12940 et seq.)

25 27. Plaintiff hereby re-alleges and incorporates by reference, as though fully set forth
 26 herein, the allegations contained in Paragraphs 1 through 26, above.

27 28. Defendants are subject to the laws of the State of California and are entities
 28 subject to suit under the FEHA for discrimination. The FEHA, Gov. Code § 12940(h) makes

1 it an unlawful employment practice for an employer to discriminate against any person in
2 recruiting, hiring, training, promotion, compensation, discipline or discharge, or any other term,
3 condition or privilege of employment because of, among other things, physical and/or mental
4 disability.

5 29. In acting in the manner alleged above, Defendants engaged in an unlawful
6 employment practice against Ms. Lowenstein, in violation of the FEHA.

7 30. Further, Defendants, via their supervisors, and/or its agents knew or should have
8 known of the discrimination committed against Ms. Lowenstein and failed to take prompt
9 remedial action; failed to investigate adequately, or at all, Ms. Lowenstein's complaints of
10 harassment and discrimination; and discipline the culpable employees involved.

11 31. As a proximate result of Defendants' actions, Ms. Lowenstein suffered and will
12 continue to suffer damages in terms of lost wages, lost bonuses, and other compensation benefits,
13 attorneys' fees, costs of suit and other pecuniary loss according to proof, and in an amount in
14 excess of the jurisdictional threshold of this Court. Ms. Lowenstein has also suffered and will
15 continue to suffer physical and emotional injuries, including nervousness, humiliation,
16 depression, anguish, embarrassment, fright, shock, pain, discomfort and anxiety in an amount
17 to be proven at trial.

18 32. Ms. Lowenstein is informed and believes that Defendants' acts, as herein alleged,
19 were carried out by its supervisory/managerial employees, officers and directors, and were
20 directed or ratified by Defendants with a conscious disregard of Ms. Lowenstein's rights and
21 with the intent to vex, injure, and annoy her, such as to constitute oppression, fraud or malice
22 under Civil Code § 3294, entitling Ms. Lowenstein to punitive damages in a sum appropriate to
23 punish and set an example of Defendants.

24 33. As a result of Defendants' discriminatory acts and wrongdoing as alleged herein,
25 Ms. Lowenstein also is entitled to reasonable attorneys' fees and costs of suit as provided in the
26 FEHA, Government Code § 12965(b).

27 PRAYER

28 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of

1 them, as follows:

2 1. For a money judgment representing compensatory damages including lost wages,
3 earnings, retirement benefits and other employee benefits, and all other sums of money, together
4 with interest on these amounts, according to proof;

5 2. For a money judgment for mental pain and anguish and emotional distress,
6 according to proof;

7 3. For an award of punitive damages, according to proof;

8 4. For costs of suit and attorney fees;

9 5. For prejudgment and postjudgment interest; and

10 6. For any other relief that is just and proper.

11
12 Dated: June 3, 2007

GIELEGHEM LAW OFFICE

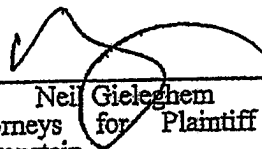
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15 
16 _____
17 Neil Gieleghem
18 Attorneys for Plaintiff Lou Ann
19 Lowenstein
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EXHIBIT A
DEFH COMPLAINT

*** EMPLOYMENT ***

COMPLAINT OF DISCRIMINATION UNDER
THE PROVISIONS OF THE CALIFORNIA
FAIR EMPLOYMENT AND HOUSING ACT

DFEH # E200506 A-1324-00-pe

EEOC # 37AA611113

If dual-filed with EEOC, this form may be affected by the Privacy Act of 1974.

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING and EEOC

COMPLAINANT'S NAME (Indicate Mr. or Ms.)

Lowenstein, Lou Ann (Ms.)

TELEPHONE NUMBER (INCLUDE AREA CODE)

(650) 591-2214

ADDRESS

1223 Howard Avenue

CITY

San Carlos

STATE

CA

ZIP

94070

COUNTY

San Mateo

COUNTY CODE

081

NAMED IS THE EMPLOYER, PERSON, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP
COMMITTEE, OR STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME:

NAME

Sears

TELEPHONE NUMBER (INCLUDE AREA CODE)

(650) 295-2035

ADDRESS

40 Hillsdale Mall

CITY

San Mateo

STATE

CA

ZIP

94403

COUNTY

San Mateo

COUNTY CODE

081

CAUSE OF DISCRIMINATION BASED ON (CHECK APPROPRIATE BOX(ES))

☐ RACE ☐ SEX ☒ DISABILITY ☐ RELIGION ☐ NATIONAL ORIGIN/ANCESTRY ☐ DENIAL OF FAMILY/MEDICAL LEAVE ☐ SEXUAL ORIENTATION
☐ COLOR ☐ AGE ☐ MARITAL STATUS ☐ MEDICAL CONDITION (cancer or genetic characteristics) ☐ OTHER (SPECIFY)

NO. OF EMPLOYEES/MEMBERS

10,000

DATE MOST RECENT OR CONTINUING DISCRIMINATION

TOOK PLACE (month, day, and year) 11/05/05

RESPONDENT CODE

59

THE PARTICULARS ARE:

- I. Between April 2004, and November 30, 2005, I was harassed by Jayti Dasgupta, Manager. On November 30, 2005, I was constructively discharged (forced to quit). I began working for the employer on October 30, 1985. At the time my employment ended I was earning \$10.95 an hour.
- II. I believe I was harassed on the basis of my disability, Turner Syndrome, and constructively discharged because of the harassment. My belief is based on the following:
 - A. Between April 2004, and November 30, 2005, I was harassed because of my disability by Jayti Dasguta, Manager. The harassment was verbal in nature, and the conduct was severe and pervasive enough to create a hostile work environment. (notes on file with DFEH)
 - B. In October 2005, during a meeting with the Manager, and Store Manager, I requested to transfer to another department because of the harassment, but I was denied. The employer failed to provide me a harassment free work environment and take immediate action when I reported the harassment.
 - C. On November 30, 2005, I was constructively discharged due to the harassment of Jayti Dasguta, and the employer failing to provide me a harassment free work environment.

*** EMPLOYMENT ***

COMPLAINT OF DISCRIMINATION UNDER
THE PROVISIONS OF THE CALIFORNIA
FAIR EMPLOYMENT AND HOUSING ACT

DFEH # E200506 A-1324-00-pe

EEOC # N/A

COMPLAINANT'S NAME(S) (Indicate Mr. or Ms.)

Lowenstein, Lou Ann (Ms.)

RESPONDENT'S NAME

Sears

THE PARTICULARS ARE:

D. I have successfully worked for the employer for twenty years (20) and never had any problems until Jayti Dasguta became my Manager in April 2004.

Page 2 of 2

RECEIVED

JUN 14 2006

BY SAN FRANCISCO DISTRICT OFFICE

Typed and mailed for signature on 06/12/06

☒ I also want this charge filed with the Federal Equal Employment Opportunity Commission (EEOC).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief, and as to those matters I believe it to be true.

Dated

6-13-06

Lou Ann Lowenstein

COMPLAINANT'S SIGNATURE

At

City

DFEH-300-01 (08/97)

SF:TB:pw

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

DATE FILED: June 14, 2006

STATE OF CALIFORNIA

EXHIBIT B
DEFH "RIGHT TO SUE" LETTERS

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

1515 Clay Street, Suite 701, Oakland, CA 94612
(510) 622-2973 TTY (800) 700-2320 Fax (510) 622-2952
www.dfeh.ca.gov



June 8, 2007

NEIL GIELEGHEM
ATTY
LAW OFFICES OF NEIL GIELEGHEM
1801 CENTURY PARK, E. STE 2300
LOS ANGELES, CA 90067

RE: E200506A1324-00-pe/37AA604343
LOWENSTEIN/SEARS

Dear NEIL GIELEGHEM:

NOTICE OF CASE CLOSURE

The consultant assigned to handle the above-referenced discrimination complaint that was filed with the Department of Fair Employment and Housing (DFEH) has recommended that the case be closed effective June 8, 2007. Please be advised that this recommendation has been accepted.

Based upon its investigation, DFEH is unable to conclude that the information obtained establishes a violation of the statute. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this complaint.

This letter is also your Right-To-Sue Notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. This is also applicable to DFEH complaints that are filed under, and allege a violation of Government Code section 12948 which incorporates Civil Code sections 51, 51.7, and 54. The civil action must be filed within one year from the date of this letter. However, if your civil complaint alleges a violation of Civil Code section 51, 51.7, or 54, you should consult an attorney about the applicable statutes of limitation. If a settlement agreement has been signed resolving the complaint, it is likely that your right to file a private lawsuit may have been waived.

Notice of Case Closure
Page Two

This case may be referred to the U.S. Equal Employment Opportunity Commission (EEOC) for further review. If so, pursuant to Government Code section 12965, subdivision (d)(1), your right to sue will be tolled during the pendency of EEOC's review of your complaint.

DFEH does not retain case files beyond three years after a complaint is filed, unless the case is still open at the end of the three-year period.

Sincerely,



Herbert Yarbrough
District Administrator

cc: Case File

Jeanne Barlett
Fair Employment Consultant
Sears Holding Management Corp
3333 Beverly Road, A3-119B
Hoffman Estates, IL 60179

DFEH-200-08ew (06/06)
ANWAOPAM

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

1515 Clay Street, Suite 701, Oakland, CA 94612
(510) 622-2973 TTY (800) 700-2320 Fax (510) 622-2952
www.dfeh.ca.gov



June 8, 2007

NEIL GIELEGHEM
ATTY
LAW OFFICES OF NEIL GIELEGHEM
1801 CENTURY PARK, E. STE 2300
LOS ANGELES, CA 90067

RE: E200506A1324-01-pe
LOWENSTEIN/DASGUPTA, JAYTI, As an Individual

Dear NEIL GIELEGHEM:

NOTICE OF CASE CLOSURE

The consultant assigned to handle the above-referenced discrimination complaint that was filed with the Department of Fair Employment and Housing (DFEH) has recommended that the case be closed effective June 8, 2007. Please be advised that this recommendation has been accepted.

Based upon its investigation, DFEH is unable to conclude that the information obtained establishes a violation of the statute. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this complaint.

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Notice of Case Closure
Page Two

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DFEH does not retain case files beyond three years after a complaint is filed, unless the case is still open at the end of the three-year period.

Sincerely,

A handwritten signature in black ink, appearing to read 'Herb Yarbrough', written in a cursive style.

Herbert Yarbrough
District Administrator

cc: Case File

JAYTI DASGUPTA
MANAGER
SEARS
40 HILLSDALE MALL
SAN MATEO, CA 94403

DFEH-200-08ew (06/06)
ANWAOPAM

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Neil Gieleghem CSBN 107389 Gieleghem Law Firm 1875 Century Park East, Suite 700 Los Angeles, CA 90067 TELEPHONE NO: 310 284 3252 FAX NO: 310 284 3253 ATTORNEY FOR (Name): Plaintiff		FOR COURT USE ONLY RECEIVED JUN 04 2008 SUPERIOR COURT CIVIL DIVISION
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 County Center MAILING ADDRESS: CITY AND ZIP CODE: Redwood City, CA 94061 BRANCH NAME:		
CASE NAME: Lowenstein v. Sears		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)	CASE NUMBER: GW 4733 92 JUDGE: DEPT:

All five (5) items below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other P/PPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/PPD/WD (23) Non-P/PPD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/PPD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input checked="" type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (05) <input type="checkbox"/> Collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
---	--	---

2. This case ☐ is ☒ is not complex under rule 1800 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|---|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial post-judgment judicial supervision |
3. Type of remedies sought (check all that apply):
 a. ☒ monetary b. ☐ nonmonetary, declaratory or injunctive relief c. ☒ punitive
4. Number of causes of action (specify): One (Discrimination under FEHA)
5. This case ☐ is ☒ is not a class action suit.

Date: June 3, 2008

 Neil Gieleghem CSBN 107389
 (TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

EXHIBIT B

CT CORPORATION
A WoltersKluwer Company

**Service of Process
Transmittal**

06/05/2008

CT Log Number 513500609



COPY

TO: Legal Intake B6-263B
Sears, Roebuck and Co
3333 Beverly Road
Hoffman Estates, IL 60179-

RE: Process Served in California

FOR: Sears, Roebuck and Co (Domestic State: NY)

e SOP

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Lou Ann Lowenstein, Plff. vs. Sears, Roebuck and Co, etc. et al, Dfts
DOCUMENT(S) SERVED:	Summons, Complaint, Exhibit(s), Cover Sheet, Notice of Case Management Conference, Case Management Statement form, Attachment(s), Stipulation and Order form
COURT/AGENCY:	San Mateo County, Redwood City, Superior Court, CA Case # CIV473392
NATURE OF ACTION:	Employee Litigation - Wrongful Termination - On November 30, 2005
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Process Server on 06/05/2008 at 09:57
APPEARANCE OR ANSWER DUE:	Within 30 days after service - file written response // 10/21/2008 at 9:00 a.m. - Case Management Conference
ATTORNEY(S) / SENDER(S):	Neil Gleeghem Gleeghem Law Firm 1875 century Park East Ste 700 Los Angeles, CA 90067 310-284-3252
ACTION ITEMS:	CT has retained the current log, Retain Date: 06/05/2008, Expected Purge Date: 06/10/2008 Image SOP - Page(s): 30 Email Notification, Legal Intake B6-263B legalint@searshc.com
SIGNED:	C T Corporation System
PER:	Nancy Flores
ADDRESS:	818 West Seventh Street Los Angeles, CA 90017
TELEPHONE:	213-337-4615

**Sears Holdings Corp.
Law Dept. Intake**

JUN 06 2008

Routed MARY SMIGIELSKI

Page 1 of 1 / JK

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents

EXHIBIT C

PLD-050

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Dennis M. Brown, Esq. SB #126575 Littler Mendelson, P.C. 50 West San Fernando Ave., 15 th Fl. San Jose, CA 95113		TELEPHONE NO. 408.998.4150	FOR COURT USE ONLY ENDORSED FILED SAN MATEO COUNTY JUL 03 2008 Clerk of the Superior Court By <u>J. Obaob</u> DEPUTY CLERK
ATTORNEY FOR (Name): Defendant, SEARS, ROEBUCK AND CO.			
NAME OF COURT: Superior Court of California STREET ADDRESS: County of San Mateo MAILING ADDRESS: 400 County Center CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME:		BY FAX	
PLAINTIFF: LOU ANN LOWENSTEIN			
DEFENDANT: SEARS, ROEBUCK AND CO., et al.			
GENERAL DENIAL			CASE NUMBER: CIV-473392

You MUST use this form for your general denial if the amount asked for in the complaint or the value of the property involved is \$1000 or less.

You MAY use this form if:

1. The complaint is not verified, OR
2. The complaint is verified, and the action is subject to the economic litigation procedures of the municipal and justice courts, EXCEPT

You MAY NOT use this form if the complaint is verified and involves a claim for more than \$1000 that has been assigned to a third party for collection.

(See Code of Civil Procedure sections 90-100, 431.30, and 431.40).

1. DEFENDANT (name): SEARS, ROEBUCK AND CO.
generally denies each and every allegation of plaintiff's complaint.
2. ☒ DEFENDANT states the following FACTS as separate affirmative defenses to plaintiff's complaint (attach additional pages if necessary):

SEE ATTACHED AFFIRAMTIVE DEFENSES

Date: July 3, 2008

Erica H. Kelley

(TYPE OR PRINT NAME)


(SIGNATURE OF DEFENDANT OR ATTORNEY)

If you have a claim for damages or other relief against the plaintiff, the law may require you to state your claim in a special pleading called a cross-complaint or you may lose your claim. (See Code of Civil Procedure sections 426.10-426.40.)

The original of this General Denial must be filed with the clerk of this court with proof that a copy was served on each plaintiff's attorney and on each plaintiff not represented by an attorney. (See the other side for a proof of service.)

PLAINTIFF (name): LOU ANN LOWENSGTEIN

CASE NUMBER:
CIV-473392

DEFENDANT (name): SEARS, ROEBUCK AND CO.

PROOF OF SERVICE☐ Personal Service ☐ Mail

A General Denial may be served by anyone at least 18 years of age EXCEPT you or any other party to this legal action. Service is made in one of the following ways:

(1) Personally delivering a copy to the attorney for the other party or, if no attorney, to the other party.

OR

(2) Mailing a copy, postage prepaid, to the last known address of the attorney for the other party or, if no attorney, to the other party.

Be sure whoever serves the General Denial fills out and signs a proof of service. File the proof of service with the court as soon as the General Denial is served.

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. I served a copy of the General Denial as follows (check either a or b):

a. ☐ **Personal service.** I personally delivered the General Denial as follows:

(1) Name of person served:

(2) Address where served:

(3) Date served:

(4) Time served:

b. ☒ **Mail.** I deposited the General Denial in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as follows:

(1) Name of person served:

(2) Address:

(3) Date of mailing:

(4) Place of mailing (city and state):

(5) I am a resident of or employed in the county where the General Denial was mailed.

c. My residence or business address is (specify):

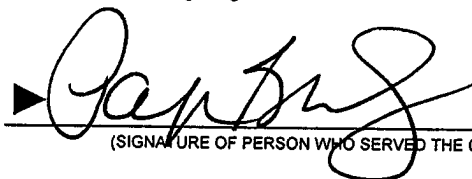
d. My phone number is (specify):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 7-3-08

Page Bridges

(TYPE OR PRINT NAME OF PERSON WHO SERVED THE GENERAL DENIAL)

► 

(SIGNATURE OF PERSON WHO SERVED THE GENERAL DENIAL)

LOU ANN LOWENSTEIN V. SEARS ROEBUCK AND COMPANY

SAN MATEO SUPERIOR COURT CASE NO. CIV 4733-92

ATTACHMENT TO GENERAL DENIAL

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION SET FORTH IN THE COMPLAINT FILED BY PLAINTIFF LOU ANN LOWENSTEIN ("PLAINTIFF'S COMPLAINT"), Defendant Sears, Roebuck and Co. ("Defendant") alleges:

That Plaintiff's Complaint fails to state any claim upon which relief can be granted.

AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

That based on information and belief, the Complaint and each cause of action alleged therein is barred by the applicable statutes of limitations, including but not limited to, California Government Code sections 12960 and 12965, and California Code of Civil Procedure sections 335.1 and 340.

AS AND FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

That each and every act done by Defendant with regard to, or in any way related to, Plaintiff's employment with Defendant was privileged, justified, and consented to by Plaintiff as a good faith assertion of Defendant's legal and contractual rights.

AS AND FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

That Plaintiff's Complaint and each of its causes of action are barred because all acts of Defendant affecting the terms and conditions of Plaintiff's employment were done in good faith and motivated by legitimate, non-discriminatory reasons and/or as a result of business necessity.

AS AND FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND

Firmwide:85626272.1 053194.1005

1 EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

2 That Plaintiff, by her own acts and omissions, including, but not limited to, her failure to
3 complain or otherwise take advantage of Defendant's policies prohibiting workplace harassment,
4 discrimination and retaliation, has waived any claims and purported claims for relief contained in the
5 Complaint.

6 AS AND FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND
7 EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

8 That Plaintiff could have, through diligence, found other employment and taken other action
9 which would have mitigated her damages, and she had an affirmative duty to do so, which was
10 breached by her failure to find other employment and take other action upon the cessation of her
11 employment with Defendant Sears.

12 AS AND FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH
13 CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

14 That all damages Plaintiff has suffered or will suffer are wholly or in part the result of her
15 own actions, or the actions of other parties, not the answering Defendant.

16 AS AND FOR A EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND
17 EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, to the extent that
18 Plaintiff claims that she has suffered emotional distress damages due to Defendant's alleged conduct,
19 Defendant alleges:

20 That the Court's jurisdiction over the subject matter of the causes of action is preempted by
21 the exclusive remedy provisions of the California Workers' Compensation Act, California Labor
22 Code section 3200, *et seq.*, because Plaintiff's alleged injuries arose as a result of her alleged
23 employment.

24 AS AND FOR AN NINTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH
25 AND EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant
26 alleges:

27 That any award of punitive or exemplary damages as sought by Plaintiff would violate the
28 due process and excessive fine clauses of the Fifth, Eighth and Fourteenth Amendments of the

Firmwide:85626272.1 053194.1005

2.

Case No. CIV-4733-92

AFFIRMATIVE DEFENSES (ATTACHMENT TO GENERAL DENIAL)

1 United States Constitution, as well as the Constitution of the State of California.

2 AS AND FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH AND
3 EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant alleges:

4 That to the extent during the course of this litigation Defendant acquires any evidence of
5 wrongdoing by Plaintiff and the wrongdoing would have materially affected the terms and
6 conditions of Plaintiff's employment or would have resulted in Plaintiff either being demoted,
7 disciplined or terminated, such after-acquired evidence shall bar Plaintiff's claim on liability or
8 damages or shall reduce such claims or damages as provided by law.

9 AS AND FOR A ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH
10 AND EVERY CAUSE OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT, Defendant
11 alleges:

12 That at all times relevant, Defendant promulgated an anti-discrimination policy and
13 complaint procedure which was communicated to Plaintiff, and Defendant exercised reasonable care
14 to prevent and correct promptly any inappropriate conduct. Plaintiff unreasonably failed to take
15 advantage of the established complaint procedures, failed to take advantage of other preventative or
16 corrective opportunities provided by Defendant and otherwise failed to avoid harm.

17 AS AND FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH
18 CAUSE OF ACTION SET FORTH PLAINTIFF'S COMPLAINT, Defendant alleges:

19 That Plaintiff consented to each of the allegedly wrongful acts she claims that Defendant
20 took against her.

21 AS AND FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO EACH
22 CAUSE OF ACTION SET FORTH PLAINTIFF'S COMPLAINT, Defendant alleges:

23 That Plaintiff has failed to timely exhaust her administrative remedies with the Department
24 of Fair Employment and Housing, the exhaustion of which is a condition precedent to the
25 maintenance of this action.

26 As of the filing of this General Denial, Defendant has no independent knowledge nor has yet
27 completed a thorough investigation or discovery of all facts allegedly constituting the causes of
28 action in the Complaint, and, based thereon, hereby respectfully requests leave of Court to amend

Firmwide:85626272.1 053194.1005

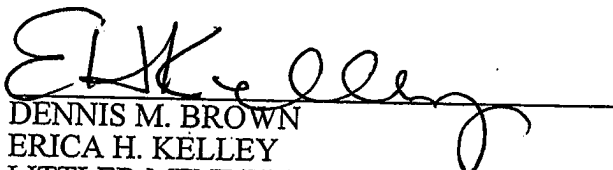
1 this Answer to include those affirmative defenses that are revealed during the course of Defendant's
2 discovery.

3
4 **PRAYER**

WHEREFORE, Defendant prays:

- 5 1. That Plaintiff take nothing from her Complaint and that the Complaint be dismissed
6 in its entirety with prejudice;
- 7 2. That Defendant be granted its reasonable costs of defending this action;
- 8 3. That Defendant be granted its reasonable attorneys' fees incurred in defense of this
9 action; and
- 10 4. For such other and further relief as the Court deems just and proper.

11 Dated: July 3, 2008

12
13 
14 DENNIS M. BROWN
15 ERICA H. KELLEY
16 LITTLER MENDELSON
17 A Professional Corporation
18 Attorneys for Defendant
19 SEARS, ROEBUCK AND CO.
20
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